SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 350

GORDON BECK, Petitioner,

vs.

UNITED STATES OF AMERICA

MEMORANDUM IN REPLY

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MEMORANDUM IN REPLY

The Solicitor General filed a brief in opposition to the petition for certiorari under Rule 24(1) of this Court's Rules of Practice which permits such briefs to show some "matter or ground why the cause should not be reviewed by this court". It is respectfully submitted that not only does the brief in opposition fail to comply with the direction of this Rule, it actually misrepresents both the facts of record and the applicable law to such an unprecedented extent that Petitioner, reluctantly, is

compelled to attempt clarification by means of this Reply.* We, therefore, earnestly invite the Court's attention to the following points:

I. *The Government has misrepresented the legal question and mis-stated the applicable law in an attempt to uphold this conviction.*

The petitioner is seeking certiorari because of a firm conviction that in this case the lower courts departed from the established rules of law governing defense instructions. In the petition, it was pointed out that this case falls squarely within the rule established by this Court in *Bird vs. United States*, 180 U. S. 356, and followed for many years by the lower courts, *viz.*, that, if there is believable substantiating evidence of record, a defendant is entitled to a separate and clear instruction on the legal validity of a claimed defense. Petitioner firmly believes that the lower courts' refusal to permit such instructions in this case deprived him of the fair trial guaranteed by the United States Constitution.

The brief in opposition takes the position that the question in this case is whether the instructions covering the elements of the offense "fairly presented" the defenses raised by the petitioner (Br. in Op. 10-11). Even the most casual reading of the petition in this case reveals that the petitioner is relying upon the rule established in the *Bird* case, *supra*; and, any reading at all of the *Bird* case reveals that this Court there held that it makes no

*The brief in opposition was also untimely. The Rules allow a respondent 30 days after receipt of a petition in which to file a brief in opposition. The petition here was served and filed on August 18, 1962. The brief in opposition was filed on September 27, 1962 — some 40 days later.

difference how clearly the elements of an offense are stated in the instructions, if the defendant claims a valid defense and offers a proper instruction, the trial court must give such instruction or be reversed. "It is well settled that the defendant has a right to a full statement of law from the court * * *." *Bird vs. United States, supra* at page 361. One is left to wonder why the Solicitor General thus ignores the legal question presented in this case.

Perhaps, more surprising than the mis-statement of the question, is the patent mis-statement of the holding of the *Bird* case itself. When this case is finally discussed in the brief in opposition (p. 11) it is dismissed as one of a series involving "some specific limited theory" on which an "affirmative defense" was predicated. The brief does not explain how the plea of self-defense in *Bird* falls in this class nor, indeed, does it teach the reader how to distinguish between a "specific limited theory" and the "general denial of intent", which it says is involved here. Moreover, in the only comment on the *Bird* case (in a footnote (Br. in Op. p. 11)), the Solicitor General's opposition states "the issue of self-defense in a murder case was not adequately put before the jury". We invite the Court's appraisal of the instruction given in the *Bird* case (180 U. S. at 361):

> "The court instructs the jury, if they believe from the evidence beyond a reasonable doubt that the defendant * * * shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated and willful, *and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm*, then it is your

duty to find the defendant guilty as charged in the indictment." (Emphasis supplied.)

As detailed in the Petition (p. 11), this Court held that the failure to give a tendered defense instruction on self-defense was reversible error. We can only invite attention to the double standard which allows the Solicitor General to conclude that the above instruction did not adequately present the issue of self-defense, while the instructions in this case (certainly less direct and to the point on defenses) "fairly presented" the defenses claimed (B. in Op. 11). This is the same dichotomous approach to the controlling law which impelled the application for certiorari in the first place. The point is that either the rule of the *Bird* case is right or it is wrong; and this is an important federal question which should be decided and not swept under the rug.

II. The Brief in Opposition grossly mis-states the facts and the evidence.

The brief filed by the Government in opposition to the petition is a transparent attempt to becloud the real issue raised by the petition by placing emphasis upon a review of the record under the heading "The Scheme and the Evidence". This recitation of evidentiary facts is not only foreign to the actual legal question raised by the petition, but is so grossly inaccurate, prejudiced and unfair as to demand reply and correction. Significantly, the statement is not taken from the opinion of the Court of Appeals, but purports to come directly from the voluminous record. Whether this is because the Government feels the Court of Appeals' statement of the case is inaccurate and incom-

plete so by because of a desire to create a more extensive aura of guilt around the petitioner is open to speculation. In either event, this recitation of "facts" contains carefully selected references to the testimony which are misleading without consideration of other testimony in the trial (either testimony from other witnesses or qualification through cross-examination), and which, in some instances, are completely inaccurate.

Without belaboring the point and only to highlight the prejudiced and unfair presentation made in the Government's brief, the following are some of the more obvious misrepresentations of the record in the Government's "summary":

1. The Government's brief (p. 3) states that "the company inserted 'help-wanted' advertisements in publications, falsely representing that it was primarily a wholesaler and jobber of knitted garments with a large expanding market for such garments". No record reference is given for this statement and there is nothing anywhere in the record, either in the testimony of witnesses or in the numerous copies of advertisements submitted by the Government as Exhibits in the trial, to substantiate the statement.

2. The Government's brief (p. 3) states that "in 1957, Beck relinquished the presidency to Tuthill, but remained as vice president and major stockholder". The testimony clearly shows that in December, 1957, Beck transferred stock to Tuthill, resulting in a major stock ownership by Tuthill and only a minority interest by Beck (T. 1131, 1259). While the petitioner contends that the percentage of stock ownership is not a relevant issue in this proceed-

ing, it is apparent that the misrepresentation in the Government's brief was intended to bolster the position previously taken by the Government that some vicarious criminal liability attaches to the petitioner because he was a stockholder.

3. The Government's brief (p. 3, 4) states that after Beck severed his relationship with the company, he continued to supply knitting machines and "received a substantial profit." Again, although petitioner contends that the element of profit is not relevant, the facts of the matter are that the uncontroverted testimony shows that rather than making any profit, Beck actually lost $17,200.00 as a result of sales of knitting machines to the company (T. 1221-1223).

4. The Government's brief (p. 4, 5) represents that witnesses testified that they did not realize they were signing chattel mortgages on their possessions. The record references in the Government's brief reflect only self-serving gratuitous statements made on direct examination and do not refer to qualifying testimony of the same witnesses developed on cross-examination (T. 478-479, 701, 762-763, 422, 621-613).

5. The Government's brief (p. 5, fn. 2) represents that a research engineer tested the knitting machines sold by the petitioner and found that it was physically impossible to knit an item in the time represented. The testimony of this witness was thoroughly discredited upon cross-examination when it was revealed that the alleged test which he conducted was not conducted in a scientific manner, although the witness claimed to be a research engineer, and that it failed to take into account time-saving

techniques which would have been known to a competent operator. (T. 838-842).

6. The Government's brief (p. 5) represents that the testimony showed that the company occasionally refused to accept the garments, but does not explain that such refusal related to garments which had been made contrary to the company's instructions and garments which were improperly made so that they could not be sold (T. 108, 137, 175-176, 442).

7. The Government's brief (p. 6) refers to the fact that the testimony showed that Beck gave instructions at sales meetings, but no reference is made to testimony showing that such instruction was to the effect that representations made by salesmen should be confined to truthful representations concerning the knitting machines and the company's program (T. 930-935, 1511, 1512, 1516, 1517).

8. The Government's brief (p. 6) reflects that the evidence showed that "the only outlets for the sale of the knitted garments were neighborhood variety or individual drug or grocery stores". This statement is directly contradictory to the uncontroverted evidence that garments were placed by the petitioner in the Denver Dry Goods Company and Joslins' (two of the largest department stores in the City of Denver) and in the Woolworth and Walgreen stores in Denver (T. 537, 549, 1117, 1120).

CONCLUSION

The misrepresentation of the record, the calculated avoidance of the legal issue and the mis-statement of the holding of this Court in the primary case on which petitioner relies, all point to the conclusion that the Brief in Opposition discloses no reason whatever why certiorari should not be granted. Indeed, the Government's approach seems to be to uphold this conviction at all costs and to avoid the establishment of clear rules defining a defendant's rights to jury instructions on his legal theory of defense. This attempt by the United States to confirm the litigating advantage given the prosecution by the courts below is itself an additional reason for immediate action by this Court.

It is respectfully submitted that, for the reasons set forth in the Petition, the petition for certiorari should be granted.

Respectfully submitted,

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